Office-Supreme Court, U.S.
FILED
DEC 28 1981
ALEXANDER L. S...
CLERK

No. 81-38

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARY ELLEN CRAWFORD, a Minor, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

---

ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

**BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS OF AFRICAN AMERICAN EDUCATION COMMISSION, COMMUNITY RELATIONS CONFERENCE OF SOUTHERN CALIFORNIA, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND,**
**(Other Amici Curiae are set forth on inside cover)**

**STEVEN SHIFFRIN**
Law School
University of California
at Los Angeles
405 Hilgard Avenue
Los Angeles, CA 90024
(213) 825-4457

**ALICE MONTGOMERY**
331 Capp Street
San Francisco, CA 94110
(415) 282-1827

**AMY RODNEY**
331 E. Cotati Avenue
Cotati, CA 94928
(707) 295-5414

Attorneys for Amici Curiae

## ADDITIONAL AMICI CURIAE

Agape Fellowship

Amalgamated Clothing & Textile Workers of America, Southern California Joint Board

Americans for Democratic Action, Southern California Joint Board

Association of Black Feminists

Black Leadership Coalition on Education

California Federation of Teachers AFT, AFL-CIO

California Task Force for Integrated Education

Catholic Community Services

Chicano Integration Coalition

Coalition for Economic Survival

Crenshaw Neighbors, Inc.

Ethical Culture Society of Los Angeles

Hispanic Urban Center

Jewish Labor Committee, West Coast Region

Los Angeles Committee for the Defense of the Bill of Rights

National Assembly of Women Religious, S.W. Region

National Association of Negro Business and Professional Women's Clubs, Inc., Los Angeles Club

National Association of Social Workers, California Chapter

National Committee against Repressive Legislation

National Political Caucus of California

San Fernando Valley Interfaith Council

Southern California Council of Churches

Southern Christian Leadership Conference of Southern California

Unitarian Universalist Service Committee

United Community Efforts, Inc.

Womens International League for Peace and Freedom, Los Angeles Branch

YWCA of Los Angeles

## TOPICAL INDEX


| | | Page |
|---|---|---|
| Table of Authorities | | iv |
| INTEREST OF AMICI CURIAE | | 1 |
| SUMMARY OF ARGUMENT | | 2 |
| ARGUMENT | | 5 |
| I | THE LOWER COURT MISINTERPRETED COLUMBUS AND DAYTON II, FAILING TO APPRECIATE THAT THE SCHOOL BOARD'S BAD FAITH FAILURE TO RESPECT THE RIGHTS OF MINORITY CHILDREN UNDER STATE LAW ITSELF VIOLATED THE FEDERAL CONSTITUTION | 5 |
| | A. The Existence Since 1963 of a State-Imposed Duty on the Los Angeles School Board to Desegregate | 6 |
| | B. The Findings of the Lower Courts that the Board Has Continually Violated that Duty in Bad Faith | 8 |
| | C. The Bad Faith Failure of the Board to Respect Its Duty to Minority Children Violates Federal Law | 9 |
| II | PROPOSITION ONE IS UNCONSTITUTIONAL UNDER ARLINGTON HEIGHTS | 13 |
| | A. Proposition One Has a Discriminatory Effect Because It Impedes Desegregation and Disadvantages Minorities | 13 |

1. The Mandatory Plan 13

2. The Voluntary Plan 16

B. The Historical Context and Specific Sequence of Events Leading up to the Passage of Proposition One Indicates the Discriminatory Intent of the Amendment 26

1. The Board Has Refused to Take Action to Desegregate the Los Angeles School System 29

2. Plans Proposed by the Board Have Been Constitutionally Defective as well as Ineffective in Ending Segregation 30

3. The Board Has Sought to Instill Community Opposition to Desegregation 33

4. The Board Has Used the Court System to Obstruct Desegregation Efforts 37

C. The Procedural and Substantive Departures From Longstanding California Institutional Structures In This Case Clearly Manifest A Discriminatory Purpose 40

1. The Special Function of the California Judiciary in Protecting Minorities and the Related Policy of Affording Access to the Courts Have Been Uniquely Violated in This Case 42

2. Depriving the Petitioners of Rights Vested in Litigation Itself Violates California Policy and Manifests Discriminatory Purpose 46

III A REMAND OF THIS CASE IS APPROPRIATE IN ORDER THAT FINDINGS OF FACT BE MADE ON THE ISSUE OF WHETHER THERE WAS AN UNDERLYING DISCRIMINATORY PURPOSE BEHIND THE ENACTMENT OF PROPOSITION ONE 51

CONCLUSION 55

APPENDIX

TABLE OF AUTHOR

Cases

Arthur v. Nyquist,
473 F.Supp. 830 (W.D.NY 1

Barrett v. Superior Court,
104 Cal.App. 657 (1930)

Billings v. Hall,
7 Cal. 1 (1957)

Chambers v. Florida,
3 309 U.S. 227 (1940)

Cisneros v. Corpus Christi Inde
School District,
467 F.2d 142 (5th Cir. 1972

Columbus Board of Education
v. Penick,
443 U.S. 449 (1979)

Committee to Defend Reproducti
Rights v. Meyers,
29 Cal.3d 252 (1981)

Crawford v. Board of Education
17 Cal.3d 280, 551 P.2d (19
(Crawford I)

Crawford v. Board of Education
113 Cal.App.3d 633, 170 Ca
495 (1980) (Crawford II)

Davis v. Board of School Comm
of Mobile County,

aff'd, 402 U.S. 33 (19 )



Best Copy Available

Dayton Board of Education v. Brinkman,
443 U.S. 526 (1979)
Dayton II 2, 3, 5, 9, 10 11, 44, 53

Edwards v. South Carolina,
372 U.S. 229 *1963) 46

Farat v. Kingsburg,
98 Cal.App. 284 (1929) 47

Flournoy v. California,
230 Cal.App.2d 520 (1964) 49

Graham v. Richardson,
403 U.S. 365 (1971) 43, 44

Green v. County School Board of New Kent County,
391 U.S. 430 (1968) 16

Hall v. St. Helena Parish School Board,
417 F.2d 801 (5th Cir. 1969)
cert. denied, 396 U.S. 904 (1969) 17

Jackson v. Pasadena City School District,
59 Cal.2d 876, 382 P.2d 878 (1963) 6

Kelly v. Guinn,
456 F.2d 100 (9th Cir. 1972)
cert. denied, 413 U.S. 919 (1973) 17

Kendall v. Kendall,
122 Cal.App. 397 (1932) 47

Keyes v. School District No. 1,
413 U.S. 189 (1972) 53

Maher v. Roe,
434 U.S. 464 (1977) 3, 11

McLaurin v. Oklahoma State Regents,
339 U.S. 637 (1950) 12

Miller v. McKenna,
23 Cal.2d 774 (1974) 47

Mirabel v. General Motors Acceptance Corp.,
537 F.2d 871 (7th Cir. 1976) 41

NAACP v. Lansing Board of Education,
429 F.Supp. 583 (W.D.Mich. 1976)
aff'd, 559 F.2d 1042 (6th Cir. 1977) 21

Pardee Construction Co. v. California Coastal Commission,
95 Cal.App.3d 471 (1979 47

Payne v. Superior Court,
17 Cal.3d 908 (1976) 45

Purdy and Fitzpatrick v. California,
71 Cal.2d 566 (1969) 43

Sail'er Inn v. Kirby,
5 Cal.3d 1 (1971) 43

San Antonio School District v. Rodriguez,
411 U.S. 1 (1973) 11

Shelley v. Kramer,
334 U.S. 1 (1948) 13

Sweat v. Painter,
339 U.S. 629 (1950) 12

Village of Arlington Heights v. Mitropolitan Houseing Development Corp.,
429 U.S. 252 (1977) 2, 4, 5, 6, 13, 21, 26 40, 46, 48, 50, 52

Williamson v. Lee Optical,
348 U.S. 483 44

Constitution

United States Constitution,
Thirteenth Amendment 3, 44

Fourteenth Amendment 3, 44, 51

Miscellaneous

California Ballot Pamphlet
p. 6 26, 27

Memorandum of Board of Education
Sept. 5, 1978, p. 2, on Crawford v.
Court of Appeal, L.A. Civ. No. 31018 37

1980-81 Racial & Ethnic Survey,
Preliminary Ethnic Survey 16, 20, 24

13 Cal.Jur.3d
Section 275 at 515 (1974) 47

73 Harv. L.Rev. 692 (1960)
Hochman, The Supreme Court and the
Constitutionality of Retroactive
Legislation 48

Los Angeles Herald Examiner,
May 20, 1980, Sec. A7 35

Sept. 12, 1980, Sec. A19 36

Los Angeles Times,
Part I, p. 3, Sept. 13, 1980 36

Part II, p. 1, April 4, 1981 24

April 17, 1981 25

Valley News,
Section 1, p. 6, April 20, 1981 24

p. 1, April 20, 1981 25

p. 4, May 20, 1980 35

Washington Post,
Sec. A14, March 17, 1981 24

A20, Sept. 12, 1980 39

United States Commission on
Civil Rights, 1977 at 87
A Generation Deprived 27, 29, 30, 34

November 1981,
With All Deliberate Speed: 1954-19??)
Transportation of Students,
pp. 37-38;
The Effect of Desegregation on
Public Education, pp. 39-44 25

No. 81-38

IN THE

SUPREME COURT

OF THE UNITED STATES

MARY ELLEN CRAWFORD, a minor, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

Respondent.

---

# BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS OF AFRICAN AMERICAN EDUCATION COMMISSION, COMMUNITY RELATIONS CONFERENCE OF SOUTHERN CALIFORNIA, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, (and others listed inside front cover)

---

## INTEREST OF AMICI CURIAE[1/]

The organizations which join in this brief are interested in insuring that minority children

---

[1/] (See p. 2)

are afforded equal educational opportunity. They are as one in the belief that this cannot be done under a system of segregated schools. They do not believe that separate can be equal.

The particular purpose of each organization is set out in the Appendix.

## SUMMARY OF ARGUMENT

In this brief, we make two arguments: the first points to the lower court's failure to properly interpret Columbus Board of Education v. Penick, 443 U.S. 449 (1979) and Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) (Dayton II) and its consequent failure to identify Los Angeles segregation as de jure in character; alternatively, the second emphasizes the lower court's disregard of Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) in assessing Proposition 1's segregative purposes.

1/ Consent letters from petitioners and respondent to the filing of this brief concurrently are being forwarded to the Clerk of this Court.

First, we show that the court below misinterpreted Columbus and Dayton II. While it rightly understood that a school board can ordinarily pursue a neighborhood school policy without violating the federal constitution, it failed to appreciate that when a school board has a duty to desegregate it cannot act under color of law in systematic disregard of that duty without violating the Thirteenth and Fourteenth Amendments. In Dayton II, the duty was federally imposed; here the duty is state imposed. Whatever the source of the duty or the source of rights of minority children, a school board that systematically denies minority children their rights violates the federal constitution. The Constitution may itself impose no obligation for a state to disperse benefits or rights, but when it does, "the manner in which they disperse benefits is subject to constitutional limitations." Maher v. Roe, 434 U.S. 464, 470 (1977). The school board here has respected the rights of white children, but not of

minority children. This it cannot do.

Second, since the trial court found there was no difference in remedy required for Los Angeles desegregation under California law or under federal decisional law it held no Arlington Heights evidentiary hearing.

The court below likewise held no evidentiary hearing and upheld the validity of Proposition 1 without regard to the evidence petitioners had presented to the trial court. That evidence overwhelmingly sustains petitioners' contention that Proposition 1 was and is racially motivated and, therefore, must, under Arlington Heights, be declared unconstitutional. Respondent presented no evidence to controvert petitioners' showing.

We describe the impact of the official action, the historical background of the decision together with the specific sequence of events, and the departure from the normal procedural and substantive institutional policies which took place to

demonstrate that the requirements of Arlington Heights have been met.

Finally, we argue that if the Court does not consider Arlington Heights to have been met, then it should remand the case to the trial court for the hearing.

## ARGUMENT

### I

### THE LOWER COURT MISINTERPRETED COLUMBUS AND DAYTON II, FAILING TO APPRECIATE THAT THE SCHOOL BOARD'S BAD FAITH FAILURE TO RESPECT THE RIGHTS OF MINORITY CHILDREN UNDER STATE LAW ITSELF VIOLATED THE FEDERAL CONSTITUTION.

The Los Angeles School Board, for many years,[2/] has violated its state imposed duty to desegregate its minority segregated schools and to confer the benefits owed under state law to minority children.

2/ In this section, we concentrate as did the court below on the findings of the 1970 trial court as affirmed by the California Supreme Court in 1976. Crawford v. Board of Education, 17 Cal. 3d 280, 551 P. 2d 28 (1976). Much of the material in the (cont.)

The lower court has sadly misread Dayton II as well as those cases which recognize that state officials cannot respect the rights of white children while ignoring the rights of minority children.

A. The Existence Since 1963 of a State-Imposed Duty on the Los Angeles School Board to Desegregate

In Crawford v. Board of Education, 17 Cal. 3d 280, 551 P. 2d 28 (1976) (Crawford I) the court traced the duty of school boards to desegregate back to Jackson v. Pasadena City School District, 59 Cal. 2d 876, 382 P. 2d 878 (1963). In Jackson, the court had declared that "the segregation of school children into separate schools because of their race, even though the physical facilities and the methods and quality of instruction in the several

2/

Arlington Heights section infra is relevant to this period and also shows the continuing recalcitrance of the Board. The Arlington Heights section presents background to show the purposes underlying Proposition 1. Here we show that segregation in Los Angeles is de jure, not de facto.

schools may be equal, deprives the children of the minority group of equal opportunities for education and denies them equal protection and due process of the law." 59 Cal.2d at 880.

In Crawford I the court observed that: "[S]ince Jackson, this court has consistently reiterated the principle that the constitutional obligations of school boards in California include an obligation to undertake reasonably feasible steps to alleviate school desegregation, regardless of its cause." 17 Cal.3d at 292. That state law duty was also recognized by the court of appeal below. 113 Cal.App.3d 633, 647, 170 Cal.Rptr. 495, 504 (1980) (hereinafter the court below or Crawford II). Accordingly, the state duty to desegregate has bound respondent board since 1963. Next we point to the judicial findings that the board has in bad faith persistently breached that duty.

## B The Findings of the Lower Courts that the Board Has Continually Violated that Duty in Bad Faith

The courts in Crawford I and Crawford II both recognized that the board had violated its obligations to minority children under state law. For example, in Crawford I, the court affirmed findings that the Board "'Has . . . since at least 1963, knowingly affirmatively and in bad faith" engaged in affirmative policies that segregated its students. 17 Cal. 3d at 288 (emphasis added). Specifically, the court found that the board had employed policies regarding (1) the siting and construction of new schools in a way leading to "heavy segregation"; (2) an open transfer policy with the "knowledge that such a policy would exacerbate school segregation because it would permit the more affluent white students to transfer out of minority segregated schools but at the same time could not be utlized by less affluent minority students to transfer into predominantly white schools"; (3) the use of feeder

school policies that it "knew or should have known would create and perpetuate segregation in such higher grade schools"; and (4) the use of mandatory attendance areas and boundaries "so as to create or perpetuate segregated schools." See generally 17 Cal. 3d at 288-89.

Most revealing of all, Crawford I affirmed findings that the Board had given minority schools "teachers, physical facilities and curriculum . . . of poorer quality . . . than at its predominantly white schools.'" Id. at 289.

The findings are now not open to question; indeed the court in Crawford II repeats them. 113 Cal. App. 3d at 642-43. The question is whether the lower court properly understood Columbus and Dayton II.

C. The Bad Faith Failure of the Board to Respect Its Duty to Minority Children Violates Federal Law.

---

The Court below failed to take the duty to desegregate and its bad faith violation into account

in concluding that no de jure segregation was present. It cited Columbus and Dayton II for propositions that are not here relevant. For example, it cited Columbus for the idea that "[D]isparate impact and foreseeable consequences, without more, do not establish a constitutional violation." 113 Cal.Rptr. 3d at 641, quoting 443 U.S. at 464. It paraded Dayton II for the proposition that "We have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful racial discrimination." Id. at 641, quoting Dayton II, 443 U.S. at 536 n. 9. It proceeded to see no specific segregative intent (id. at 646) and, therefore, found no de jure segregation.

What Crawford II ignored is that there is "something more" (Columbus, 443 U.S. at 646) in this case: the bad faith violation of a duty to desegregate. Clearly where a federal duty to desegregate is involved, questions of specific intent go by the boards. As the court said in Dayton II,

the measure of a school board's conduct under an "unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." 443 U.S. at 53 (emphasis added). As the Court explained in Columbus, each instance of a failure or a refusal to fulfill this affirmative duty violates the Fourteenth Amendment. 443 U.S. at 667.

We are at a loss to understand why the source of the duty makes the slightest difference. Our contention is not that the states had to create this duty; our contention rather is that once a duty to give to minority children the benefit of desegregated education has been established "the manner in which it dispenses benefits is subject to constitutional limitations." Maher v. Roe, 432 U.S. at 470. Indeed as the Court noted in Maher, (id.) the basic framework for analyzing claims such as these was set out in San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973), "We must decide,

first whether [the state action] operates to the disadvantage of some suspect class . . . ."

Here that conclusion is obvious. The Board, as the findings below show, has affirmatively disregarded its obligation to minority children. It has served white children appreciating their needs, and respecting their rights while flagrantly ignoring the rights of minority children. This Court, even pre-Brown was ready to strike down state actions that favored white students over black. See, e.g. Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (no duty to have schools, but can not ignore needs of black students).

What the Board has done is worse than providing separate but equal facilities. Here it has openly flouted the law. Acting under color of state law, it has persistently violated and ignored its duties under state law to minority children while serving white children. It should not be permitted to do this. "Equal protection of the laws is not achieved

through indiscriminate imposition of equalities." Shelley v. Kramer, 334 U.S. 1, 22 (1948).

## II

## PROPOSITION ONE IS UNCONSTITUTIONAL UNDER ARLINGTON HEIGHTS

### A. Proposition One Has a Discriminatory Effect Because It Impedes Desegregation and Disadvantages Minorities

One of the relevant inquiries under Arlington Heights is whether the action has a discriminatory effect. 429 U.S. at 266.

#### 1. The Mandatory Plan

Plans which included mandatory pupil assignment and transportation were in effect in the Los Angeles school system for the school years 1978-79, 1979-80, and most of 1980-81. With regard to the 1980 plan, a review of the enrollment statistics indicates (1) that the plan made substantial strides towards desegregating the participating

minority schools and (2) since its withdrawal those schools have once again become segregated.

In 1980-81, forty-four minority elementary schools took part in the mandatory portion of the desegregation plan. In 41 of these schools there was an improvement in the minority-white ratio of students. The statistics indicate that the mandatory plan was successful in achieving desegregation of the participating minority schools. The real story, however, is reflected in the plight of these schools since the dismantling of the mandatory plan. Of the forty-four schools participating in the plan on the elementary school level, virtually every one has reverted to its previous segregated status.

PARTICIPATING MINORITY ELEMENTARIES
IN 1980-81 P/C PROGRAM-REDUCTION
IN RACIAL ISOLATION

| Schoo. | 1980-81 % Minority Residential Enr'lmt | 1980-81% Min. Actual Enr'lmt | 1981-82 % Min. Actual Enrl. After Dismantling |
|---|---|---|---|
| | (Participating P/C Grades) | | |
| O'Melveny | 94 | 56 | 98 |
| Windsor Hills | 97 | 61 | 95 |
| Baldwin Hills | 99 | 66 | 100 |
| Wilshire Crest | 93 | 61 | 97 |
| Camellia | 84 | 54 | 85 |
| Cahuenga | 88 | 58 | 88 |
| Roscoe | 80 | 51 | 85 |
| Fenton | 89 | 60 | 92 |
| Coliseum | 100 | 71 | 94 |
| Morningside | 87 | 59 | 91 |
| San Fernando | 96 | 68 | 99 |
| Noble | 75 | 48 | 74 |
| Hart | 71 | 44 | 72 |
| Haddon | 97 | 70 | 98 |
| Montague | 88 | 61 | 90 |
| Vaughn | 99 | 74 | 99 |
| Braddock | 86 | 61 | 89 |
| Barton Hill | 93 | 69 | 93 |
| Pacoima | 99 | 76 | 99 |
| Lankershim | 77 | 55 | 80 |
| Queen Anne | 98 | 76 | 99 |
| Osceola | 76 | 55 | 83 |
| 54th Street | 99 | 78 | 100 |
| Sylvan Park | 88 | 68 | 80 |
| Park Western | 84 | 64 | 68 |
| Filmore | 92 | 73 | 99 |
| Hillcrest | 99 | 80 | 100 |

| | | | |
|---|---|---|---|
| Hawaiian | 95 | 76 | 95 |
| Telfair | 98 | 80 | 98 |
| Cienega | 99 | 82 | 100 |
| Virginia Road | 98 | 81 | 98 |
| Arminta | 70 | 54 | 73 |
| El Dorado | 71 | 56 | 71 |
| Sharp | 90 | 77 | 93 |
| Dayton Hts. | 93 | 80 | 95 |
| Cabrillo | 68 | 55 | 77 |
| Gridley | 64 | 52 | 66 |
| Arlington Hts. | 99 | 87 | 99 |
| Van Ness | 75 | 63 | 30 |
| Vine | 87 | 83 | 85 |
| Crescent Hts. | 76 | 75 | 77 |
| Playa Del Rey | 66 | 69 | 72 |
| Richland | 65 | 73 | 71 |
| Canfield | 54 | 63 | 66 |

Source: 1980-81 residential figures from Board compilation; 1980-81 Racial and Ethnic Survey; Preliminary Racial Ethnic Survey, Oct. 1981.

2. The Voluntary Plan

The Board insists upon the implementation of an all voluntary plan for desegregation. Such plans do not, however, provide meaningful desegregation. A voluntary plan was struck down by this Court in Green v. County School Board of New Kent County, 391 U.S. 430, 440-441 (1968). Lower federal courts have consistently struck them

down.[3/]

A review of the school board's voluntary plan demonstrates that this plan, like all voluntary plans, is insufficient as a tool for desegregation unless mandatory provisions act as a supplement to the program. The school board's plan relies heavily on two programs, Permits With Transportation (PWT) and Magnet schools. PWT allows students who choose to do so to attend a different school from the one that is in the neighborhoods. The magnet program creates certain schools which because of their asserted uniqueness, are designed to attract students.

After considering the evidence the trial court concluded that the Magnet program was ineffective in achieving desegregation. "Both the district

---

3/ See, e.g. Hall v. St. Helena Parish School Board, 417 F.2d 801, 807 (5th Cir. 1969), cert. denied, 396 U.S. 904 (1969); Davis v. Board of School Commissioners of Mobile County, 430 F.2d 883 & 889 (5th Cir. 1970), aff'd, 402 U.S. 33, 37 (1971); Kelly v. Guinn, 456 F.2d 100, 108-109 (9th Cir. 1972, cert. denied, 413 U.S. 919 (1973).

and the experts .... are unanimous that it is unlikely that any minority segregated schools in Los Angeles will be desegregated by the use of magnets and that the use of magnets cannot desegregate the district." Superior Court Opinion, Findings and Conclusions dated July 7, 1980 at 23, C.T. 17470. More importantly, however, is the fact that "the initial magnet program's success, if any there was, has been attributed to the threat of mandatory assignment..." Id. The total ineffectiveness of the magnet program is reflected in the statistics for the following schools:

| | % Minority Enrollment | | | |
|---|---|---|---|---|
| School (Grades) Magnet Program | 1978-79 | 1979-80 | 1980-81 | 1981-82 |
| 102nd Street (4-6) fund. | 100 | 100 | 100 | 100 |
| 93rd Street (4-6) | | 100 | 100 | 100 |
| Markham (7) | | 100 | 100 | 100 |
| Dublin (1-6) fund., car awar | 99 | 100 | 100 | 100 |
| 107th Street (4-6) fund. | 98 | 100 | 100 | 100 |
| Riggin (4-6) bil/mult | 98 | 95 | 100 | 96 |

| | | | | |
|---|---|---|---|---|
| 111th Street (4-6) gifted | 97 | 99 | 100 | 99 |
| Audubon (7-9) gifted | | | 100 | 99 |
| Drew (7-9) | | | 100 | 100 |
| Fremont (10-12) math/sci | 100 | 99 | 99 | 100 |
| Belvedere (7-9) bil/mult | 100 | 98 | 98 | 99 |
| El Sereno (4-9) fund. | | | 96 | 97 |
| El Sereno (7-9) gifted | 100 | 96 | 92 | 88 |
| Russell (1-6) gifted | | | 87 | 93 |
| Stevenson (7-8) gifted | 77 | 84 | 86 | 71 |
| Figueroa (1-6) gifted | | 79 | 84 | 98 |
| Griffith (7-9) math/sci | 91 | 93 | 81 | 88 |
| Hillcrest Ces (1-6) | | | 79 | 81 |
| Peary (7-9) fund. | 77 | 86 | 77 | 77 |
| Mid-City Alt (K-12) | | | 76 | |
| Filmore (4-6) fund. | | 82 | 76 | 66 |
| Ambler (1-6) gifted | 89 | 82 | 77 | 81 |
| 32nd Street (1-6) | 83 | 84 | 77 | 73 |
| Sierra Park (1-6) gifted | | | 75 | 81 |
| Amestoy (K-4) | | 79 | 71 | 64 |
| Banning Cip | | | | 80 |
| Dorsey Cip | | | | 100 |
| Figueroa Gifted (1-4) | | | | 98 |
| Franklin Cip | | | | 79 |
| Jordan Tech Occup. | | | | 99 |
| Lincoln Med. Health | | | | 97 |
| Manual Arts HCI | | | | 99 |

| | |
|---|---|
| San Fernando Cip | 81 |
| Washington Com. Arts | 100 |
| Washington Math/Sci. | 100 |

Source: 1978, 1979, 1980 Racial and Ethnic Surveys; Preliminary Racial Ethnic Survey, Oct. 1981

The PWT program was also found to be ineffective in achieving desegregation for the following reasons:

> "There are usually only disadvantages to the sending school and few advantages. The minority sending school remains segregated. There is no history of a reverse PWT influx into sending schools by white students. . . ."

> "The minority child's PWT experience does not remove the stigma attached to the sending school or the stigma to the child of going from that sending school who understands that the school he would normally be assigned to would be an all-minority school were it not for his own effort to leave that school."

> "[I]t is often the case that the PWT minority child is accorded a second class status in the receiving school in that he is continually subject to the threat of having his attendance at that school discontinued for disciplinary reasons when that sanction would not be applied to the resident student. . . ."

July 7 Opinion, pg. 20, 59 CT 17467-17468.

"That the history in this district of voluntary compliance with the mandate is one of failure in desegregating minority schools."

Finding of Fact No. 31, July 7, 1980 Opinion, p. 92, 59 CT. 17538

This critical failing of PWT, i.e. the fact that it places a disproportionate burden on minority child children, is relevant in an analysis under Arlington Heights.

In determining whether official action has a discriminatory impact, consideration is given to whether the action "bears more heavily on one race than another." Arlington Heights, 429 U.S. at 266. This is certainly the case here. Time and again lower federal courts have rejected voluntary plans wherein the minority students bear the full burden of achieving desegregation.[4/]

---

4/ E.g. NAACP v. Lansing Board of Education, 429 F.Supp. 583, (W.D. Mich. 1976), aff'd 559 F.2d 1042 (6th Cir. 1977); Arthur v. Nyquist, 473 F.Supp. 830, 839-840 (W.D. NY 1979); Cisneros v. Corpus Christi Independent School District, 467 F.2d 142, 153 (5th Cir. 1972).

Adoption of a voluntary plan for desegregation purposes in Los Angeles will result and has resulted in minority students, the victims of segregation, bearing the burden of desegregation. At the time of trial approximately 18,500 students took part in the PWT program. Only 40 to 50 white children participated. (July 7th Opinion at p. 19 fn. 2; C.T. 17466). This meant that 99.9% of the students in the program were minority. Id. There can be no doubt that it is minority students who bear the burden.

This burden is exacerbated by the long bus rides which result in the implementation of the PWT program. The trial court noted that, under the PWT program, the "average bus ride is 55 minutes each way, which means that thousands of these children are subject to even longer times en route to school." (Id. at 19 (emphasis in original).[5/]

---

5/ The same is true today. We are advised that PWT travel time is as long as 1 hour, 40 minutes (cont.)

Under the mandatory portion of the plan, however, bus rides averaged 20 minutes. Valley News 5/20/80, Sec. 1, pg. 10. Given these statistics, it is difficult to imagine how a voluntary plan can be constitutionally countenanced. Perhaps the most significant conclusion reached by the trial court was that the all-voluntary plan was "presented with the full realization by the board that of all the possible approaches to desegregation the voluntary plan would have the least success in desegregating the minority segregated schools." July 7, 1980 Order at 31; C.T. 17478.

Not only was the voluntary plan the least successful in achieving desegregation, but the "all-voluntary plan proposed by the respondent board holds no promise of meeting the mandate in the desegregation of minority schools." July 7, 1980 Finding

---

5/ (cont.)

and Magnets as long as 1 hour and 55 minutes, with the average PWT route being 50.25 minutes and the Magnet average being 62.92 minutes. The earliest Magnet route begins at 6:05 a.m.; the earliest PWT at 6:15 a.m.

No. 31, at 92-93; C.T. 17338-9 (emphasis supplied). This statement leads to the inevitable conclusion that the board's purpose in seeking to invoke Proposition One and in resisting mandatory assignment and transportation is to impede and obstruct desegregation.

One final point. The school board extolls the virtues of the voluntary plan and sought to publicize the horrors of mandatory. In the first place, the mandatory provisions of the desegregation plan involved only a small percentage of students. Out of a total of 685 schools in the district only 153 schools were subject to the mandatory portions of the plan. Los Angeles Times, 4/4/81, Part II, p. 1; Valley News, 4/20/81, Section 1, p. 6. Further, out of a total district enrollment of 534,712 (1980 Racial and Ethnic Survey) only 57,000 students took part in the mandatory plan, both sending and receiving schools. Washington Post, 3/17/81, A14. The actual number of students who were bussed as that part of this plan were

23,300 (Los Angeles Times, 4/17/81, Valley News 4/20/81, Sec. 1, p. 1) compared to a total of 30,200 in PWT and magnets. (L.A.U.S.D. Public Information Office).

In the second place, what "horrors" have occurred were within the voluntary part of the plan. The board has, for instance, focussed and brought attention to long bus rides as an argument against "forced bussing." The long rides, however, are the result of the implementation of the voluntary programs and not from the mandatory.[6/]

---

6/ See With All Deliberate Speed:1954-19?? (United States Commission on Civil Rights, November 1981) Transportation of Students, pp. 37-38, and The Effect of Desegregation on Public Education, pp. 39-44.

B. The Historical Context and Specific Sequence of Events Leading up to the Passage of Proposition One Indicates the Discriminatory Intent of the Amendment

---

Under an Arlington Heights analysis, a court reviews the historical background surrounding the amendment's enactment (429 U.S. at 267) and, in particular, the "specific sequence of events leading up (t0) the challenged decision." (Id.) While these are two separate factors, they are mentioned together because the evidence to be discussed in this section is relevant to both.

One of the primary purposes of Proposition One was to impede and frustrate desegregation efforts. This purpose was, in fact, noted by the Legislative Analyst in the California Ballot Pamphlet mailed to California voters:

> "This proposition would limit the power of California courts to require desegregation."
> Ballot Pamphlet Pg. 6

The main target of this constitutional amendment, however, was one city, i.e. Los Angeles. In the

ballot pamphlet, the author of the constitutional amendment commented that "Proposition One does everything the people of California may legally do to stop court-ordered forced busing in Los Angeles and in all other California school districts." Ballot pamphlet, Pg. 9, emphasis in original.

Since one of the purposes of Proposition One was to thwart desegregation efforts in Los Angeles, any analysis of the history and sequence of events surrounding the amendment's enactment must necessarily focus on desegregation efforts in Los Angeles. Any discussion of desegregation in Los Angeles, however, begins and ends with the actions of the school board since they have played a major role in the history of desegregation in that city. A review of their actions leads to the inescapable conclusion that the board has consistently attempted to "ignore, delay, circumvent, and avoid its responsibility to eliminate segregation." A Generation Deprived, (United States Commission on Civil Rights, 1977 at 87. This conclusion

is based on the following:

(1) they have continued to operate an unconstitutionally segregated school system and have refused to take affirmative steps towards desegregation;

(2) when forced, under court order, to develop desegregation plans, the plans were deemed wholly ineffective, and poorly prepared with little or no regard for their desegregative potential;

(3) when one of the proposed plans was finally implemented, they sought to instill community opposition to it; and

(4) they have used the court system to delay and prevent implementation of desegregation plans.

To top it all, the Board passed a resolution supporting Proposition 1 and actually lobbied the Governor to sign a bill calling for extraordinary procedures - an early election - for the vote on the Proposition. Exh. 521; 57 R.T. 8515.

### 1. The Board Has Refused to Take Action to Desegregate the Los Angeles School System

When this lawsuit was first filed in 1963, the trial court thought the School Board would voluntarily develop a plan for the desegregation of the schools. No such action occurred. (Superior Court July 7, 1980 Opinion at p. 6; C.T. 17453). In its 1970 decision, the trial court concluded that the School Board was guilty of acting in bad faith in that (1) it had failed to take any steps to alleviate the de jure segregation which existed and (2) had, in fact, acted affirmatively to contribute to and perpetuate the segregation. Superior Court May 1970 Findings; C.T. 560-585, 603-606). In 1976, the California Supreme Court also concluded that the "the board had not attempted to alleviate segregation in the district's schools." (A Generation Deprived, supra, at p. 11).

In 1977, hearings were conducted by the United States Commission on Civil Rights regarding

desegregation in Los Angeles. The commission concluded that:

> "A shifting majority of the numbers of the Los Angeles City Board of Education have violated their oaths of office by refusing for more than 13 years to take any affirmative steps to alleviate the segregation and racial isolation of students in the Los Angeles Unified School District."
> A Generation Deprived, supra, at 56

The Commission also noted that "(i)t is apparent from the history of its actions that the school board will require stimulation from external, independent sources before any meaningful progress is made toward desegregation." Id. at 47.

### 2. Plans Proposed by the Board Have Been Constitutionally Defective as well as Ineffective in Ending Segregation

The Commission's belief that the Board would have to be forced to develop a meaningful desegregation plan is borne out by the Board's actions throughout the course of this litigation. It was not until 1977, when the Board was forced to do so by the State Supreme Court, that a desegregation

plan was developed and presented to the court. The plan was rejected by the trial court as constitutionally infirm. (Superior Court Order of July 5, 1977; C.T. 2267).

The second Board plan was also found to be insufficient, but was reluctantly allowed to be implemented in 1978 in order to start desegregation efforts. (Superior Court Order of Feb. 7, 1978; C.T. 6934).

In 1979, the Board presented an all-voluntary plan for approval by the court.

On July 7, 1980, the trial court rendered its opinion of this plan. It noted that:

> "the respondent board does not have a course of action which is designed to make meaningful progress in the elimination of harms arising out of minority segregated schools, and... does not appear to have resolved itself to achieve any such plan in the near future."
> (July 7 Opin. at p. 3; C.T. 17450)

As to the merits of the plan itself, the court rejected the plan because:

> "1. It is not designed to desegregate any of the minority schools of the

Los Angeles Unified School District.

2. It treats minority children with less concern than other children in the district.
3. It relies entirely upon the voluntary compliance of the mandate by the children and their parents, which reliance is neither reasonable nor realistic.
4. Its provisions, viewed in light of the board's activities, do not demonstrate the board's commitment, even if given more time, to take additional steps to produce meaningful progress in the desegregation of the district's minority schools and the alleviation of the harms arising from segregation. (Id. at 5, C.T. 17452)

The trial court commented on the plan (Plan II) that had been in operation since the 1978-79 school year: "The manner in which the plan was executed carried the seeds of failure to achieve its limited goals." (Trial Court Opinion and Findings, July 7, 1980, p. 3; C.T. 17450). As to the Board's all-voluntary plan, the court found that it was "hastily conceived," "not thoroughly planned," and was "presented with the full realization by the board that of all the possible approaches to desegregation the voluntary plan would have the least

success in desegregating the minority segregated schools." Id. at 31, C.T. 17478.

### 3. The Board Has Sought to Instill Community Opposition to Desegregation.

Perhaps the most destructive action taken by the board, however, is its public opposition to desegregation efforts. Certain Board members have purposefully sought to instill community opposition to desegregation rather than community support. The Civil Rights Commission believes that official support is necessary in order to achieve desegregation:

> "The peaceful implementation of desegregation is not by chance. One of the most important conclusions of this report is that the support of school officials and other local leaders strongly influences the outcome of desegregation. The public generally follows the lead of officials who are responsible for school desegregation. . . ." at 223

The Commission found that "The leadership factor is the most crucial component in the peaceful implementation of desegregation. In communities

where leaders either voice opposition to desegregation or refuse to support the effort publicly, the result is often chaotic, with confusion, anxiety, turmoil and disruption prevailing." at 224. This is precisely the situation that occurred in Los Angeles.

In 1976, the Commission expressed strong concern that officials in Los Angeles, including school board members, were making public statements which were designed to "reinforce community fears about the negative potential of school desegregation." A Generation Deprived, supra, at 83.

When the Commission conducted its hearings in 1977, it found a wide range of community, religious, labor, business, and other organization support for integration. Id. at 100-152. Organizations such as ourselves still strongly support desegregation efforts. Rather than drawing upon this support, however, the Board has sought to undermine this support by instilling fear in the Los Angeles community about desegregation. A

present example of this is found in the Board's actions after the trial court rendered its May 19, 1980 opinion. One Board member, before even reading the opinion, made the following statement which was published in a number of Los Angeles newspapers:

> "If I was a white parent I'd be looking for a private school or looking for a new home outside the Los Angeles Unified School District."
> Los Angeles Herald Examiner, 5-20-80, A7.

Another Board member commented that:

> "(Judge Egley's order, if allowed to stand) will bring about the devastation of the public school system.."
> Id.

As reported in one newspaper, a third member "referred to the explosion Sunday of Mt. St. Helens in the State of Washington and said a "volcano of similar proportions has erupted from the Egly courtroom." Valley News 5-20-80, §1, p. 4.

The trial court, after rendering its July 7, 1980 opinion, had ordered meetings to be held to explain

the new plan, to seek community input into the plan, and to help alleviate concerns that parents might have about the plan. The board's response, however, was to use these meetings to publicly oppose the plan, to tell parents that the plan would not work, and to create uncertainty in the minds of the parents. Meetings were held at elementary schools in the district. "At each meeting a letter was read in which the Board of Education disavowed responsibility for the desegregation plan. Board members, including the President of the Board, appeared at several meetings in the San Fernando Valley to tell parents the board opposed the busing order." Los Angeles Times, 8-13-80, Part I, p. 3. One letter from concerned parents dramatically portrays the intent of the board to instill opposition to desegregation:

> "You ask if you will still be in junior chorus and we have to tell you we have been told by the school board that most of the extras you enjoyed are being eliminated to pay for the integration plan."
> Los Angeles Herald Examiner, A19, 9-12-80.

### 4. The Board Has Used the Court System to Obstruct Desegregation Efforts

One of the Board's tactics in achieving its goal of preventing the desegregation of the Los Angeles School System has been to appeal virtually every court order. The most dramatic demonstration of this concerns the board's actions in regard to Plan II which was implemented in 1978. That plan, although constitutionally infirm, was accepted in order to make some movement towards desegregation of the Los Angeles School system. But the Board joined with Bustop, an intervening organization from San Fernando Valley, and asked the State Supreme Court to continue a stay of its very own plan. Crawford v. Court of Appeal, L. A. Civil No. 31018, Memorandum of Board of Education dated September 5, 1978, p. 2. In 1979, it again attempted to halt the continuation of its own plan and recommended that another, this time an all-voluntary plan, be accepted. While this plan was

before the trial court, Proposition One passed.

After the passage of the constitutional amendment, the Board's immediate response was to invoke the provisions of Proposition One. With the passage of the constitutional amendment, the board believed that it would finally accomplish its purpose of bringing desegregation efforts to a halt in Los Angeles. The trial court ruled, however, that since the Board had been found guilty of intentional discrimination in the operation of its segregated school system, Proposition One was not applicable. May 19, 1980 Minute Order, C.T. 16850.

The result of the trial court's ruling was more appeals, culminating in the appeal presently before this Court. On July 7, 1980, the trial court, because of the refusal of the board to develop a workable desegregation plan, was forced to develop a plan itself. July 7, 1980 Opinion; C.T. 17452. The Board refused to cooperate with the court in developing a workable desegregation plan for the

coming school year: "While the appeals were pending the judge and his aides, with virtually no help from the board, worked on implementation of his ruling." Washington Post, 9-12-80, Pt. A-20. All of the Board's efforts were in the direction of preventing, through the court system, the implementation of the plan, and specifically, preventing mandatory pupil assignment and transportation, despite the fact that it knew that mandatory plans were the only effective way of desegregating the minority segregated schools. Rather than taking the time to reassure students and parents and apprising them of what they could expect at the commencement of the new school year, it focussed all its efforts on blocking the implementation of the plan. As a result, the Los Angeles school system remains in the same condition it was in 1963, with no desegregation.

C. The Procedural and Substantive Departures From Longstanding California Institutional Structures In This Case Clearly Manifest A Discriminatory Purpose

In Arlington Heights, the Court recognized that "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." 429 U.S. at 267.

Perhaps the most reprehensible feature of Proposition One is that it was designed to apply not only to future desegregation actions, but also was specifically calculated to directly interfere with this case,[7/] a case in which rights had already

[7/] "Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil assignment or pupil transportation, or which (cont.)

been secured by a final judgment that had been sustained by the California Supreme Court (Crawford v. Board of Education, 17 Cal. 3d 280 (1976)).

This extraordinary interference with the orderly enforcement of rights secured by a final judgment[8] plainly departs from longstanding and fundamental California institutional safeguards and structures. The willingness to depart from these structures

---

7/ (cont.)

> requires a plan including such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification." (emphasis added)

That this was directed specifically at the 1970 judgment in Crawford is clear beyond peradventure of doubt.

8/ We note this is not a case where the issue is whether changes in law should apply to trial court judgments not yet finalized in the appellate process. Even there, serious constitutional questions are implicated. See, e.g., Mirabel v. General Motors Acceptance Corp., 537 F.2d 871, 875 n.3 (7th Cir. 1976).

itself is compelling evidence of discriminatory purpose. Specifically, this aspect of Proposition One runs roughshod over (1) the understanding that it is a special function of the judiciary in California to protect the rights of minorities against the excesses of the majority together with California's strong policy of affording access to the courts to assure that the rights of the minority shall not be abused; and (2) the strong California policy that rights secured in litigation shall not be taken away by legislation retroactively applied.

### 1. The Special Function of the California Judiciary in Protecting Minorities and the Related Policy of Affording Access to the Courts Have Been Uniquely Violated in This Case

If there is any aspect of the constitutional system that unites commentators and the fifty states, it is that a vital function of the courts is to protect minorities against the exdesses of the majority. This court put it in Chambers v. Florida, 309 U.S.

227, 241 (1940), "Under our Constitutional system, courts stand against any winds that blow as houses of refuge for those who might suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement." California is in accord. See, e.g., Committee to Defend Reproductive Rights v. Meyers, 29 Cal. 3d 252, 281 (1981) (poor afforded special protection beyond federal constitutional requirements because they share "many characteristics of other 'insular minorities who may not be adequately protected from discriminatory treatment by the general safeguards of the legislative process."); Accord, Sail'er Inn v. Kirby, 5 Cal. 3d 1, 19 (1971) (women afforded special constitutional protection beyond federal constitutional standards because of "second class citizenship. . . Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities."); Purdy and Fitzpatrick v. California, 71 Cal. 2d 566, 578-79 (1969) (anticipating Graham v. Richardson,

403 U.S. 365 (1971) aliens entitled to strict standard of review because of risk of prejudice "a special mandate compels us to guard the interests of aliens.")

What is unusual about this case is not that a majority would try to change policy (protecting minorities) in the future;[9/] what is striking is that a state majority would in unprecedented fashion actually seek to interfere with a court's judgment in Los Angeles.

The distortion of California's policy of judicial protection for minorities rights is best exposed in

---

9/ Even as to that issue, we believe a rational basis test would be patently insufficient. This Court, to be sure, in Dayton II, 443 U.S. at 531, n.5, observed that rescission of prior resolutions supporting desegregation would be unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment. We make two observations. First, the question of whether states may rescind protections for minorities is not the same as whether some degree of heightened scrutiny should be afforded when that is done. Given the special concern of the Thirteenth and Fourteenth Amendments for protecting minorities, actions taken to deprive them of benefits important to eliminate badges of servitude deserve a measure of judicial concern greater than that afforded to Oklahoma opticians. See, Williamson v. Lee Optical, 348 U.S. 483, 488 (1955). Second, recission of benefits to minorities when done with an improper purpose is unconstitutional. Personnel Administrator v. Feeney, 442 U.S. 256, 272 (1979).

colloboration with the violation of its equally strong policy of access to the courts. In Payne v. Superior Court, 17 Cal. 3d 908, 911 (1976), the California Supreme Court observed that "In a variety of contexts, the right of access to the courts has been reaffirmed and strengthened throughout our 100-year history. Moreover, it affirmed that the right "'includes access to all courts. . . without regard to the type of petition or relief sought'". Id. 914 (emphasis added). In substance, what Proposition One says to petitioners is this: "You have won rights to school assignments and desegregated education in the one institution specially designed to protect your rights. We take that away. Now, go to a political institution dominated by a majority and forego any access to the courts to enforce the rights you have won." This is unprecedented. Its departure from settled practice is so extreme as to negate professed desires to save gas, preserve the environment or imagined worries about

school bus safety.[10] The "departure" feature of Arlington Heights has been satisfied. A discriminatory purpose is present.

### 2. Depriving the Petitioners of Rights Vested in Litigation Itself Violates California Policy and Manifests Discriminatory Purpose

Proposition One conclusively carves out an exception to California's policy that final judgments are final, that rights won in litigation have vested. That exception applies to minority students seeking to secure their state guaranteed right to desegregate education and to them only.

As far back as 1857, the California Supreme Court declared that legislation impairing vested

---

[10] These purposes are obvious makeweights unless somehow school bus safety or the environment is better protected by buses that ride pursuant to a "voluntary" program. Other state purposes such as preserving harmony and tranquility in the state simply cater to race prejudice. Cf. Edwards v. South Carolina, 372 U.S. 229 (1963) (answer to hostile audience problem is to quiet the audience in the absence of inability to control it).

rights is "repugnant to the plainest principles of morality and justice, and is violative of the spirit and letter of our Constitution. . ." Billings v. Hall, 7 Cal. 1, 11-12 (1957). Since then it has been uniformly recognized that the legislature is without power to impair or destroy the obligations of contractual or vested rights, and any statute which affects a vested right cannot be given retrospective operation. Pardee Construction Co. v. Californis Coastal Commission, 95 Cal. App. 3d 471, 479 (1979).[11/] See also Miller v. McKenna, 23 Cal. 2d 774 (1974).

Similarly, there is no doubt that final judgments are vested rights in California. See, e.g., Kendall v. Kendall, 122 Cal. App. 397 (1932); Barrett v. Superior Court, 104 Cal. App. 657 (1930; 13 Cal. Jur. 3d §275 at 515 (1974) ("Like a common-law

---

11/ No different standard applies when the attempted divestiture takes place via the amendment process. See Farat v. Kingsburg, 98 Cal. App. 284, 291 (1929).

cause of action, a judgment is such a vested right of of property that the legislature cannot, by a retroactive law either destroy or diminish its value in any respect.")

The treatment by the court below of the vested rights argument was cryptic and evasive. First, without any explanation, it announced that the only vested right in the case was the right to be free of intentionally segregative action. 113 Cal. App. 3d at 655. But that simply ignored the existence of the 1976 decision of the California Supreme Court in this case which, if it did nothing else, plainly reaffirmed the continuing right of minority students to be free of segregation where reasonable and feasible steps could be taken to cure the condition. Here, as described in Arlington Heights, the factors usually considered important in California[12/] were ignored.

---

12/ These factors, of course, have independent federal constitutional significance. See generally Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960).

Second, the court below observed that "all" the amendment did was to "remove from the Courts the remedy of pupil school assignments and pupil transportation as one among scores of remedies available for use by a court to end racial isolation." Id. at 655-656. This was ingenuous. As we have previously discussed, the supporters well knew what they were doing in designing the amendment. A court cannot end segregation if it cannot compel the assignment of students. That has been this Court's experience in numerous cases in the South and the North. California has long recognized that the removal of a remedy vital to the protection of a vested right is the same as removing the right itself: "Of course, the removal of all, or substantially all, of an individual's remedies for enforcing a right would have the same practical effect as destroying the right itself. 'Remedies are the life of rights.'" Flournoy v. California, 230 Cal. App. 2d 520 (1964).

The court's brief and revealing discussion of the vested rights issue highlights the unusual steps taken in this case. A state senator from Los Angeles and a school board reacting to constitutents fueled by the same fears and stereotypes that have motivated citizens to resist desegregation in Dayton, Columbus, and elsewhere transformed those fears into law. The racial fears of Los Angeles are entitled to no more respect than those with similar fears in the South and the North. The evidence overwhelmingly points to the conclusion that segregative intent is present here and that the special role of the courts in protecting minority children must not be abandoned.

From the above, it is clearly seen that the criteria of Arlington Heights have been met and that Proposition One should not be allowed to stand. If the Court is not satisfied, however, that this discussion has demonstrated that fact, the case should be remanded for the evidentiary hearing contemplated by Arlington Heights. We discuss

this in the following section.

## III

## A REMAND OF THIS CASE IS APPROPRIATE IN ORDER THAT FINDINGS OF FACT BE MADE ON THE ISSUE OF WHETHER THERE WAS AN UNDERLYING DISCRIMINATORY PURPOSE BEHIND THE ENACTMENT OF PROPOSITION ONE

In its May 19, 1980 order, the trial court relied on its 1970 ruling as affirmed by the California Supreme Court in 1976 that the Los Angeles School Board had been guilty of de jure segregation in violation of the Fourteenth Amendment to the United States Constitution. As a result, the trial court did not reach the issue of the constitutionality of Proposition One. Evidence on the issue of intent to discriminate had been produced by the petitioners below, although no rebuttal evidence was introduced by the School Board. The trial court, since it did not reach the issue, did not make any relevant findings of fact.

Nor did the Court below examine the evidence on the issue of intent. Instead, it refused to look past the purposes recited in the constitutional amendment itself in clear violation of the requirements of this Court's opinion in Arlington Heights, supra (113 Cal. App. 3d 633 at 654-655.) The Court of Appeal then, without a single reference to the evidence, dismissed as "pure speculation" the possibility that intent to effect racial segregation was a motivating factor in Proposition One's passage. But in the next sentence the Court itself, again without reference to any evidence in the trial court, speculated as to the possible permissible purposes behind Proposition One. Crawford II, supra, at 655.

This Court's opinion in Arlington Heights recognized that "(d)etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights, supra, 429 U.S. at 266. No such

inquiry was made in this case.

This Court and its varying members have acknowledged that the inquiry into the factual evidence of unconstitutional purpose should be made in the first instance by the trial court, subject to review by appellate courts. Dayton II, 433 U.S. at 419. "The District Court, in the first instance, subject to review by the Court of Appeals, must make new findings and conclusions as to violations in light of this opinion, Washington v. Davis, and Arlington Heights..." Id. (citations omitted). Realizing the difficulty of the task, this Court remanded the case to the trier of fact to make the complex factual determinations in the first instance." Id. See also the concurring opinion by Brennan, J., Id. at 421, 422 (supporting the remand to the District Court); Keyes v. School District No. 1 (1972) 413 U.S. 189, 205 (case remanded to district court for resolution of factual matters).

The opinion in Columbus also provides support for a remand. The majority opinion acknowledged

that the role of the trier of fact is to make findings which will not be disturbed by the Court of Appeals or by this Court unless the findings are clearly erroneous. 443 U.S. at 454-55. Justices Stewart and Burger agreed. Finally, Justice Rehnquist stated:

> "I do not suggest that the inquiry required by Dayton I and Keyes is a simple one, and reviewing courts must defer to the findings of District Court judges. But appellate courts also must ensure that these judges are asking themselves the right questions; it is clear in the instant case that critical questions regarding causality and purpose were not asked at all."
>
> Rehnquist, J., dissenting. Id. at 524.

In the instant case, no factual findings were ever made regarding the issue of intent to discriminate. The Court of Appeal did not ask any questions. This case indicates, therefore, a remand for factual findings. It is the belief of amici that a remand will result in a finding of discriminatory intent. The evidence supporting such a finding is, in fact, overwhelming, as demonstrated by the previous discussion in this brief.

## CONCLUSION

The judgment below should be reversed or, in the alternative, the case remanded for the preparation of findings of fact on the issue of discriminatory intent and/or for the holding of a hearing thereon.

Respectfully submitted,

ALICE MONTGOMERY
AMY RODNEY
STEVEN SHIFFRIN

Attorneys for Amici Curiae,
African American Education
Commission, et al.